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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re O.L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. O.L., Defendant and Appellant.	D052352 (Super. Ct. No. JCM203195)

APPEAL from orders of the Superior Court of Los Angeles County, Morton Rochman, Judge, and the Superior Court of San Diego County, Joe O. Littlejohn, Judge. (Retired Judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

The Superior Court of Los Angeles County declared minor O.L. a ward of the court (Welf. & Inst. Code, § 602) after making a true finding she unlawfully took and

drove a vehicle (Veh. Code, § 10851, subd. (a)). The court declared the offense a felony[1] and transferred the case to San Diego County Juvenile Court for disposition. At the disposition hearing, the court adopted the recommendations in the probation officer's report and committed O.L. to Breaking Cycles for 240 days. The juvenile court later vacated the order committing O.L. to Breaking Cycles. O.L. filed a notice of appeal in Los Angeles Superior Court, and the matter was transferred to this court.

O.L. contends the evidence is insufficient to support a true finding that she lacked consent in taking the vehicle, and that both the Los Angeles and the San Diego courts abused their discretion in designating the charged offense as a felony. We affirm the orders.

FACTS

On June 2, 2007, O.L. and a female friend were invited by another friend, Danny, to a residence in Agoura Hills. Danny's friends, Sami Khatib and Dragan Terzue had just moved into a new condominium in Agoura Hills. Because Khatib and Terzue had been drinking, Danny arranged for a female friend to pick up O.L. and her friend. The female friend dropped the two girls off late in the night and left. Khatib and Terzue had never met O.L. or her friend, and had allowed the two girls to come over only at Danny's insistence. Khatib and Terzue went to sleep a little after 10:00 p.m., and later Danny left the condominium.

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1 Vehicle Code section 10851, subdivision (a), is a "wobbler" punishable either as a felony or a misdemeanor. (See *In re Nancy C.* (2005) 133 Cal.App.4th 508, 510.)

When Khatib and Terzue woke up, they found O.L. and her friend sleeping in their living room. Khatib asked the girls how they planned to get home because he and Terzue had to go to work. O.L. asked Khatib if he or Terzue could take her home, or at least drive her halfway. Khatib told O.L. that they could not.

Khatib left the room to take a shower, but asked Terzue to stay in the living room to keep an eye on the girls. Later, Terzue showered while Khatib went to get dressed. Khatib heard the front door close and thought that the two girls had left. After getting dressed, Khatib went to his car to get his sunglasses when he saw O.L. and her friend walking around. O.L. was pushing the remote control on Terzue's keys, apparently searching for the car. Khatib yelled to the girls, "hey, what are you guys doing?" but O.L. found Terzue's car and got in. When Khatib reached the car, O.L. had started the car and was attempting to maneuver it out of the parking space. After narrowly missing Khatib and bumping into another car, O.L. managed to get the car out of the space and drove off.

Khatib called the police and interrupted Terzue's shower to tell him what had happened. By the time a police officer arrived at the condominium, he informed Terzue and Khatib that the two girls had been taken into custody.

Both Khatib and Terzue testified that they did not give either O.L. or her friend permission to drive Terzue's car.

DISCUSSION

O.L. challenges the sufficiency of the evidence to support a true finding for unlawful taking and driving of a vehicle. She also contends that both the Los Angeles

and the San Diego court abused their discretion in treating the unlawful taking and driving of a vehicle as a felony.

I

SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE TRUE FINDING

O.L. asserts the People did not meet their burden to show she lacked the owner's consent to drive the car. O.L. concedes that both Khatib and Terzue testified that they did not give O.L. permission to take the vehicle. However, she argues that "a reasonable trier of fact could not rest [its] decision on such testimony because Mr. Khatib's and Mr. Terzue's testimony was inherently unreliable." According to O.L., their testimony is unreliable "in light of the amount of alcohol the men admitted to consuming the prior day and night." O.L. asserts that the men could have given consent the night before, but were too drunk to remember.

The standard of review of a juvenile court's true finding for sufficiency of the evidence is the same as in convictions in criminal cases. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371; *In re Michael M.* (2001) 86 Cal.App.4th 718, 726.) "[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) We do not reweigh the evidence, nor do we make credibility determinations; the trier of fact makes such determinations. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "The standard of appellate review is the same in

cases in which the People rely primarily on circumstantial evidence." (*People v. Bean* (1988) 46 Cal.3d 919, 932.)

Here, the record supports the true finding made by the Los Angeles court. Both Khatib and Terzue testified that they did not give O.L. permission to take Terzue's car. O.L.'s argument that the two men consented the night before is directly contradicted by the series of events that occurred the next morning when Khatib awakened O.L. and her friend. The court found Khatib and Terzue's testimony credible, and we are not in a position to reassess this determination on appeal. Although O.L. calls this evidence "inherently unreliable" because Khatib and Terzue were drinking and could have forgotten giving consent the night before, the events the next morning are uncontradicted. Moreover, although Khatib stated that the two men had been drinking the night before, nowhere in the record does he state they drank excessively or that they were drunk. How much alcohol they each consumed and their level of inebriation is merely speculation. Substantial evidence supports the court's true finding that O.L. lacked consent to take Terzue's car.

II

ABUSE OF DISCRETION IN TREATING THE OFFENSE AS A FELONY

O.L. also asserts that both the Los Angeles and the San Diego courts abused their discretion in not treating the charged offense as a misdemeanor. We disagree.

Welfare and Institutions Code section 702 provides, in part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a

misdemeanor or felony." Thus, a decision to treat an offense punishable as either a misdemeanor or a felony is within the court's broad discretion. (See Pen. Code, § 17, subd. (b).) Although a trial court must declare a wobbler offense a misdemeanor or felony (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1209), the court need not state its reasons for making its determination. (*In re Jacob M.* (1989) 210 Cal.App.3d 1178, 1180-1182.) However, courts have listed some general factors for a trial court to consider, such as: " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' " (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 978, quoting *People v. Morales* (1967) 252 Cal.App.2d 537, 547.)

On appeal, " '[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' " (*Alvarez*, *supra*, 14 Cal.4th at pp. 977-978, quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) If reasonable people may disagree on a determination made based on the court's discretion, the determination will be upheld. (*Alvarez*, *supra*, 14 Cal.4th at p. 978.)

A. The Adjudication Hearing

O.L. asserts that the factors used by the Los Angeles court in the adjudication hearing "actually mitigated against the crime being set as a felony." Specifically, she argues that because the crime involved using the driver's keys and not a forceful break-in,

and based on the motive behind the taking of the car, the court should have reduced the offense to a misdemeanor. Additionally, O.L. points to her plans to join the military when she turns 18 as a mitigating factor presented to the court at the adjudication hearing, claiming a felony conviction will make her ineligible for service.

At the conclusion of the adjudication hearing, O.L.'s defense counsel asked the court to treat the offense as a misdemeanor. Defense counsel explained that:

> "[O.L.] was invited up to . . . Agoura Hills with these men who were much older than her who took advantage of the situation really and really were acting inappropriately in front of and with this minor. [¶] Additionally, she has been in and out of foster care her entire life, just recently became a 602 ward from San Diego. She has expressed a desire to me to join the military at 18. A felony would prevent her from doing that. [¶] And I'd ask that the court seriously consider reducing this to a misdemeanor as it is a wobbler."

The court considered this and refused, stating: "[T]he court finds that this in fact is a -- could be a wobbler but the court fixes it as a felony charge. . . . [¶] . . . [¶] [T]he court finds . . . the offense to be a felony based upon the manner of perpetration, the property taken, how it was taken, where it was taken as well."

On this record, we cannot say the trial court abused its discretion in fixing the offense as a felony. Although O.L. argues that the circumstances surrounding the crime do not support the court's decision, we review the court's exercise of discretion for irrationality and arbitrariness. The record shows that O.L. came to Khatib and Terzue's condominium with no plans for how she was to get home. When she was unable to persuade the two men to give her a ride, she took Terzue's keys and found his car. Despite Khatib telling her to stop, she pulled the car out of the parking space, hitting

another car and nearly hitting Khatib. These facts could reasonably lead a court to find that the crime committed here should be treated as a felony. O.L.'s plans to enter the military when she turns 18, although relevant to the court's consideration, do not require reversal. It is possible that O.L.'s record may be expunged or the offense may later be reduced to a misdemeanor, making her eligible to enter the military. Nevertheless, nothing in the record or the court's decision makes the determination of the offense as a felony irrational or arbitrary. Certainly another trial court, faced with similar facts, could have reduced the crime to a misdemeanor, but the failure to do so here was not an abuse of discretion.

B. The Disposition Hearing

O.L. argues that the San Diego court erred when it "refused to reduce the wobbler offense after making unfounded slanderous comments about [O.L.'s] character and without fully considering the impact that felony theft convictions would have upon [O.L.'s] ability to rehabilitate and mature into adulthood." She asserts:

> "[I]t is unclear from the record whether [information regarding her plans to join the military] was considered at the disposition hearing in San Diego by Honorable Judge Littlejohn. While the Probation Officer's Report states that [O.L.] 'wants to join the Air Force and get a job in the medical profession' it is not specified in the record that Honorable Judge Littlejohn was fully informed of this information or if the court was informed that by keeping the offense a felony, that [O.L.] would be precluded from enlisting."

O.L. also asserts the court "slanderously labeled [her] a 'delinquent prostitute' " and that this shows the arbitrariness of the court's commitment order.

Although O.L. asserts that she argued again that the offense should be reduced to a misdemeanor at the disposition hearing, the record does not reflect this assertion.[2] The record from the July 16, 2007, disposition hearing does not indicate the defense made a request to reconsider the designation of the offense as a felony. Moreover, when a trial court exercises its discretion on the issue of a wobbler, "[t]he key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor." (*In re Manzy W.*, *supra*, 14 Cal.4th at pp. 1199, 1209; see also *In re Kenneth H.* (1983) 33 Cal.3d 616, 620, fn. omitted ["[T]he crucial fact is that the court did not state at any of the hearings that it found the [offense] to be a felony."].)[3] Further, the rules of court for a disposition hearing specifically state: "*Unless determined previously*, the court must find and note in the minutes the degree of the offense committed by the youth, and whether it would be a felony or a misdemeanor had it been committed by an adult." (Cal. Rules of Court, rule 5.795, subd. (a), italics added; see also Cal. Rules of Court, rule 5.790, subd. (a)(1).) Therefore, O.L.'s argument that the court erred in not making another determination of the offense as a misdemeanor and not a felony is not supported by the record.

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2 Indeed the statement in her opening brief that "at the disposition hearing, [O.L.'s] new trial attorney requested the court to reduce the felony to a misdemeanor" is not followed by a citation to the record.

3 While this case presents a slightly different procedural background because the adjudication and disposition hearings were heard by different courts from different counties, we see no reason to depart from the holdings in *In re Manzy G.* and *In re Kenneth H.*, which simply require a review of the entire record for a trial court's determination of the offense as a misdemeanor or a felony.

Additionally, we note that the statement by the trial court referring to O.L. as a "delinquent prostitute" cannot be evaluated without context. In context, the statement does not show an irrational or arbitrary exercise of discretion by the court in imposing a sentence. The court attempted to explain to O.L. the life path on which she had set herself, stating she had better opportunities. The court addressed O.L., saying:

> "[N]ow in terms of what we are given in life. We're given what we're given, young lady. And your life can work for you if you make it work for you, regardless of the circumstances. Am I aware that people are given obstacles in life? I certainly am. Am I aware that there's one way for you to go because of these obstacles? No, there isn't. [¶] All of what your grandpa has said is true. I don't doubt it. But it doesn't mean that you have to be a delinquent prostitute, does it? No it doesn't. There are a number of options that are available to you in life. If life gives you lemon, make lemonade out of it and conduct that's right. [¶] But I'm saying you're not presenting yourself to me with any unique set of circumstances that people have not overcome in life and made their life work for them really great. What can you do? This is what you have been given. You can dedicate your life to helping people."

The court's comments do not support O.L.'s contention that the court exercised its discretion in an arbitrary fashion. Instead, the comments appear to be the court's attempt to show O.L. the road she may be headed down and that she has other options. The court finished by saying, "Because you're bright what I'm going to do is give you an opportunity to settle for a minute so that your family can visit you and try to help you to find yourself at this point." Viewing the statements in context, we cannot conclude there was an abuse of discretion.

Regarding O.L.'s contention that the record does not show that the San Diego court considered the information regarding O.L.'s plans to join the military, we also

conclude there was no abuse of discretion. As we have explained, the court in the disposition hearing did not have sua sponte duty to reconsider the designation of the offense as a felony. Moreover, evidence of O.L.'s plans to enter the military is not such a mitigating factor as to require a reversal for abuse of discretion. The same reasoning we outlined above, for the adjudication hearing, would apply to the San Diego court at the disposition hearing. Further, as O.L. concedes, information regarding her hopes to enter the military was in the probation officer's report, which the court reviewed and whose recommendations it adopted. However, even if it the court failed to consider this information, there was no abuse of discretion by the San Diego court in imposing its commitment order on O.L, especially when O.L. failed to renew her request to have the offense reduced to a misdemeanor at the disposition hearing.

DISPOSITION

The orders are affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.